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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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| <p>STATE OF UTAH,</p> <p>Plaintiff,</p> <p>vs.</p> <p>KEN SALAZAR, in his official capacity<br/>as Secretary for the Department of<br/>Interior; the DEPARTMENT OF THE<br/>INTERIOR, an agency of the United<br/>States of America; ROBERT V.<br/>ABBEY, in his official capacity as<br/>Director for the Bureau of Land<br/>Management; and the BUREAU OF<br/>LAND MANAGEMENT, an agency of<br/>the United States of America,</p> <p>Defendants.</p> | <p><b>MEMORANDUM IN SUPPORT OF<br/>MOTION FOR LEAVE<br/>TO PARTICIPATE AS<br/>AMICUS CURIAE</b></p> <p>Case No. 2:11-cv-00391</p> <p>Judge: Dee Benson</p> |
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## **INTRODUCTION**

The State of Alaska, through its Attorney General, hereby requests permission to participate in this case as amicus curiae. This case involves facial challenges to the legality of the Bureau of Land Management’s (“BLM”) Wild Lands program, which was established administratively by Order 3310 of the Secretary of Interior, Ken Salazar (“Secretary”), on December 22, 2010, as well as certain as-applied challenges to specific land management decisions in the State of Utah. While some of the issues raised in this case are specific to Utah, resolution of the fundamental issues in the case will affect all states in which BLM administers public land. With over 72 million acres of BLM-administered land in its borders—more than any other state—Alaska is uniquely situated to provide the Court with perspective on the national impacts of its decision in Utah.

### **I. Secretarial Order 3310 and “Wild Lands”**

Order 3310 creates a new “Wild Lands” management category for public land and, in conjunction with BLM Manuals 6301, 6302, and 6303, amends BLM’s prior land management planning process by creating new procedures for applying the new Wild Lands designation to public land. The Wild Lands program was established by administrative fiat, and violates the provisions of the Federal Land Policy and Management Act of 1976 (“FLPMA”) that require the Secretary to provide notice and comment opportunity and to coordinate development of land management programs with affected states.<sup>1</sup> The Wild Lands directives also violate FLPMA’s multiple use mandate

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<sup>1</sup> 43 U.S.C. § 1712(c)(9) & (f).

by elevating the Wild Lands designation above other land use designations,<sup>2</sup> including statutorily mandated principle or major uses.<sup>3</sup> The Wild Lands program also violates the Wilderness Act of 1964 (the “Wilderness Act”) by allowing BLM to administratively designate Wild Lands, which, according to the Order and Manuals, are based on the same definition of “wilderness” as that in the Wilderness Act.<sup>4</sup> The Wilderness Act specifically reserved to Congress the authority to designate wilderness.<sup>5</sup> Because of these FLPMA and Wilderness Act violations, the Wild Lands program is ultra vires and BLM is without authority to implement it.

In addition to facially violating FLPMA and the Wilderness Act, the Order and Manuals also violate the Administrative Procedure Act (“APA”), because they arbitrarily and capriciously depart from BLM’s statutory authority,<sup>6</sup> and constitute substantive rulemaking without adherence to APA notice and comment procedures.<sup>7</sup> Furthermore, the Wild Lands order and manuals constitute a major federal action affecting the quality of the human environment and, as such, should not have been implemented prior to

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<sup>2</sup> 43 U.S.C. §§ 1712(c)(1), 1732(a).

<sup>3</sup> 43 U.S.C. §§ 1702(c) & (d), 1712(e)(2).

<sup>4</sup> 16 U.S.C. § 1131(c).

<sup>5</sup> 16 U.S.C. § 1131(a).

<sup>6</sup> 5 U.S.C. § 706(2)(A)&(C).

<sup>7</sup> 5 U.S.C. §§ 551(5), 553; 5 U.S.C. § 706(2)(D).

BLM's compliance with the National Environmental Policy Act ("NEPA") and preparation of a programmatic Environmental Impact Statement.<sup>8</sup>

## II. Amicus Status for Alaska is Appropriate in this Case

District courts have inherent authority to appoint or deny *amici* which is derived from Rule 29 of the Federal Rules of Appellate Procedure.<sup>9</sup> Amicus participation is "a privilege within the sound discretion of the court," and depends "upon a finding that the proffered information of amicus is timely, useful, or otherwise necessary to the administration of justice."<sup>10</sup> Amicus status is appropriate "when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide."<sup>11</sup> "Amicus curiae fulfill the role by submitting briefing designed to supplement and assist in cases of general public interest, supplement the efforts of counsel, and draw the court's attention to law that might otherwise escape consideration. An amicus curiae is not a party to litigation."<sup>12</sup> Furthermore, while amici perform a supplemental, advisory role to the Court, it is "perfectly appropriate" for amici

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<sup>8</sup> 42 U.S.C. § 4332(2)(C).

<sup>9</sup> *Martinez v. Capital Cities/ABC-WPVI*, 909 F.Supp. 283, 286 (E.D.Pa.1995) (collecting cases).

<sup>10</sup> *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir.1991). *See also Northern Sec. Co. v. United States*, 191 U.S. 555, 555-56 (1903); *National Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir.2000).

<sup>11</sup> *Community Ass'n for Restoration of Env't. v. De Ruyter Brothers Dairy*, 54 F.Supp.2d 974, 975 (E.D.Wash.1999). *See also Raytheon Aircraft Co. v. United States*, 501 F. Supp.2d 1323, 1325 n.1 (D. Kan. 2007) (noting that court considers arguments of amici that are not merely duplicative of arguments raised by the parties).

<sup>12</sup> *Id.* *See also Scheidler*, 223 F.3d at 616.

to “take a legal position and present legal arguments in support of it.”<sup>13</sup> Amici are not required to be “totally disinterested.”<sup>14</sup>

Alaska is greatly impacted by the fundamental legal issues raised in this case because BLM manages over 72 million acres of public land in Alaska, more land than BLM manages in any other state. Due to Alaska’s youth as a state, remote geography, and nascent infrastructure, much of Alaska is inherently wild, and resource development on Alaska’s public lands is in its infancy. Large swaths of Alaska appear much as Utah and other western states looked 100 years ago. BLM’s compliance with the law—particularly fulfillment of FLPMA’s multiple use mandate<sup>15</sup> and statutorily-defined primary uses<sup>16</sup>—on public lands in Alaska therefore is of paramount importance to the State. This Court’s determinations regarding BLM’s authority to inventory and manage for protection of wilderness characteristics will affect all states with BLM land. Alaska, as the state with the most BLM land in the country, and the state with the most undeveloped BLM “wild” land in the country, is well-positioned to advise the Court regarding the broader impacts of the case brought by the State of Utah and wider aspects of the Wild Lands policy.

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<sup>13</sup> *Funbus Systems Inc. v. California Pub. Util. Comm’n*, 801 F.2d 1120, 1124-35 (9<sup>th</sup> Cir. 1986), *citing Miller-Wohl Co. v. Comm’r Labor & Industry*, 694 F.2d 203, 204 (9<sup>th</sup> Cir.1982).

<sup>14</sup> *See Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9<sup>th</sup> Cir.1982).

<sup>15</sup> 43 U.S.C. §§ 1712(c)(1), 1732(a).

<sup>16</sup> 43 U.S.C. §§ 1702(c) & (l), 1712(e)(2).

Furthermore, Alaska's interest in BLM's land management authorities and policies is particularly keen because the Alaska National Interest Lands Conservation Act ("ANILCA") specifically prohibits BLM from managing recommended wilderness in Alaska under the non-impairment standard of section 603 of FLPMA,<sup>17</sup> instead requiring that such land be managed in accordance with "applicable land use plans and applicable provisions of law."<sup>18</sup> Therefore Alaska is particularly affected by judicial determinations regarding the Wild Lands policy because the policy is embedded in BLM's planning process, and thus may impermissibly frustrate congressional intent that BLM land in Alaska not be subject to restrictive, wilderness-style management without specific congressional approval.

Alaska seeks leave to participate as amicus at this early stage of the proceedings so that it may assist the Court by filing memoranda, when appropriate, on non-dispositive motions that may substantially affect the content and timing of dispositive motions. The content and timing of dispositive motions will, in this case, play a key role in the final result. Alaska's perspective—as the state with the most BLM land in the country, and as the state with the most potential Wild Lands in the country—on this case will help the Court understand the implications of the Court's decisions, which will reach far beyond the boundaries of Utah.

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<sup>17</sup> 43 U.S.C. § 1782(c).

<sup>18</sup> 43 U.S.C. § 1784.

### III. Conclusion

Alaska is well-positioned to assist the Court as amicus in this case, particularly with respect to the facial challenges to the Wild Lands program. For the reasons stated above, Alaska respectfully requests that the Court grant this motion and permit Alaska to participate as amicus in this matter.

DATED this 29<sup>th</sup> day of April, 2011.

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